SIERRA CLUB
GRAND CANYON CHAPTER, ARIZONA

IBLA 83-600 Decided June 25, 1984

Appeal from decision of Arizona State Office, Bureau of Land Management, denying appellant's protest to the implementation of herbicide spraying program. EA #AZ-010-83-333.

Vacated.

1. Environmental Quality: Environmental Statements -- Environmental Quality: Herbicides -- National Environmental Policy Act of 1969: Environmental Statements

A decision to utilize the herbicide 2,4-D in a vegetation management program will be vacated where it is based on an environmental assessment which lacks a worst case analysis and the record discloses uncertainty as to the effect of the herbicide on the human environment.

APPEARANCES: Michael Gregory, McNeal, Arizona, for appellant; Lawrence A. McHenry, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Sierra Club, Grand Canyon Chapter, Arizona, appeals from a decision of the Director of the Arizona State Office, Bureau of Land Management (BLM), dated April 27, 1983, denying appellant's protest to BLM's implementation of an herbicide spraying program for certain public lands located in northern Arizona (Pocum) and southern Utah (Pahcoon). 1/

On February 23, 1983, BLM issued its "EA [environmental analysis] Decision Record" for the Pocum spray program in which it selected a proposal to control 2,200 acres of big sagebrush (Artemisia tridentata) with the chemical 2,4-D amine to encourage the natural reestablishment of grasses and forbs

1/ The BLM Arizona State Office explained that it has no jurisdiction over public lands in Utah and its decision to spray affected only those lands under its jurisdiction. See BLM's Motion to Dismiss dated June 30, 1983, note 4.

under less competitive conditions. The spray site is located in several sections in T. 38 and 39 N., R. 11 W., Gila and Salt River meridian. Based on the EA (#AZ-010-83-333), the Shivwits Resource Area Manager concluded that there were no significant impacts from this program and that no environmental impact statement (EIS) was necessary.

By letter of April 19, 1983, appellant protested BLM's decision to permit application of the herbicide. In its statement of reasons for the protest dated April 22, 1983, appellant contended that BLM failed to give proper notification of this project to the public and to solicit comments from the general public or concerned organizations. Appellant alleged that there were numerous inadequacies in the EA for this project including BLM's failure to address potential impacts of the spraying on birds, wildlife, plant life, and soil microbiology and biomass. Appellant contended that BLM failed to adequately discuss the toxicity of 2,4-D. Also, appellant pointed out that BLM failed to present a worst case analysis (WCA) for use of 2,4-D, including a discussion of potential high risk in areas where scientific data on health effects was lacking.

The Arizona State Director, BLM, denied the protest by decision of April 27, 1983, holding that the proposed action and alternatives thereto were carefully analyzed in the EA and the allotment management plans (AMP's); that the EA was prepared in accordance with the regulations of the Council on Environmental Quality (CEQ), which had been adopted to implement the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1982); that the action to implement spraying was consistent with the Shivwits-EIS for Proposed Grazing Management; and that the impacts on the resources in the area were assessed and measures to mitigate any irreversible adverse impacts had been incorporated in the EA Decision Record.

BLM requested the Board to issue an order declaring its decision denying appellant's protest to be in full force and effect immediately in order that the herbicide could be applied while favorable conditions existed. BLM asserted that delay might force postponement of the project until the following year. By order of April 29, 1983, the Board granted BLM's request. Counsel for BLM has represented that, subsequent to the Board's order, BLM began its preparations to spray the area on May 6, 1983, and completed the spraying on May 8, 1983.

In its statement of reasons, appellant recognizes that the primary objective of its appeal has been mooted by the Board's order, but requests that the Board rule on the following issues:

> 1. That BLM has acted wrongfully and contrary to proper procedure in this case by failing to involve the public at each step of the projects; and
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> 2. That the Agency acted wrongfully and contrary to proper procedure by carrying out an herbicide project in the Shivwits Resource Area when the EIS for that area specifically says that chemicals will not be used for land treatments; and
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> 3. That use of herbicide 2,4-D was further improper since the Agency should not use any chemical which has not been shown

to be free of significant risks of carcinogenicity, mutagenicity, teratogenicity or other genetic diseases.

Appellant asserts that BLM ignored or contravened several requirements of NEPA in failing to prepare an EIS or a finding of no significant impact (FONSI); in failing to prepare an adequate benefit/cost analysis; in failing to give public notification of the spraying; and in failing to solicit public involvement in connection with issuing the EA. Appellant also asserts error in the failure to thoroughly analyze potential risks from the chemical BLM proposed to use, particularly the failure to credit scientific evidence and judicial acknowledgment of the herbicide's potential genetic toxicity.

In response, BLM states that it prepared an in-depth EA which addressed the spraying of 2,200 acres of sagebrush in a remote location on public land that contributed no vital resource values, i.e., wildlife habitat, watershed, or recreation. BLM contends that the project was presented to the Grazing Advisory Board and the Arizona Game and Fish Department for comment and that a decision record which amounted to a FONSI, signed on February 23, 1983, concluded that no significant impacts were found in the EA. Thus, BLM contends an EIS was not necessary. BLM asserts that the spray was included in the benefit/cost analysis for the Lambing AMP where the spraying took place. BLM acknowledges that it did not specifically consider herbicides in preparing the grazing EIS because a moratorium existed at the time regarding the use of phenoxy herbicides.

BLM offers data from various authorities in order to refute appellant's arguments that it completely ignored scientific evidence regarding potential toxicity of 2,4-D. BLM cites the 1981 monograph entitled "Public Concerns about the Herbicide 2,4-D" by Dr. Wendell R. Mullison in support of its conclusion that 2,4-D is a safe herbicide for rangeland brush control providing basic safety rules and Environmental Protection Agency (EPA) label instructions are followed. BLM alleges that the EPA recently reviewed all available research and concluded that 2,4-D does not pose an imminent hazard or unreasonable risk of adverse effect when used according to label precautions. BLM also quotes the Council on Scientific Affairs for the American Medical Association which reported: "In spite of the voluminous data on the biologic effects of the phenoxy-type pesticides and the associated chlorinated dioxins, there is still little substantive evidence for the many claims that have been made against these compounds." Council on Scientific Affairs, American Medical Association, Health Effects of Agent Orange and Dioxin Contaminants, 248 J.A.M.A. 1895 (1982). BLM's review of 2,4-D purportedly included consideration of carcinogenicity, mutagenicity, birth defects, and nerve damage which might result from use of the herbicide.

BLM contends that it did consider the possible effects of spraying on the environment of the Pocum site and concluded that the treatment area lacks any significant resource values and wildlife habitat. BLM states that its considerations included the concerns raised by the Arizona Game and Fish Department. According to BLM, the Arizona Strip District has either tried or considered all of appellant's suggested alternatives for brush control.

On July 5, 1983, BLM filed a motion with the Board to dismiss the appeal because the controlling issue is moot and there exists no remedy by

which the Board can grant the requested relief. In response, appellant contends that the issue of BLM's use of 2,4-D in Arizona has not been mooted by application of the spray in this case and appellant requests that the Board recognize the scientific uncertainty concerning the safety of 2,4-D and rule against its use. Appellant also requests that the Board consider BLM's failure to meet the requirements of NEPA.

In those relatively rare circumstances where the Board grants a motion to place a decision into effect pending final resolution of the appeal in accordance with 43 CFR 4.21(a), the Board will view with skepticism a subsequent motion to dismiss the appeal as moot which would have the effect of depriving appellant of the right of objective administrative review on the merits. Although the Board can no longer grant appellant relief by preventing the spraying of 2,4-D in the area in question, we find that appellant has presented issues on appeal which warrant our consideration. BLM stated in its decision that it anticipates further spraying of 2,4-D in other areas of Arizona. The issues raised by appellant concerning the use of 2,4-D are applicable to other decisions of BLM to spray the herbicide. Therefore, we find that the issue is not moot and deny BLM's motion to dismiss the appeal.

The issue for consideration is whether BLM's decision to spray the herbicide 2,4-D, as set forth in its environmental assessment, meets the requirements of NEPA and the regulations promulgated by CEQ concerning research and disclosure of potential effects of the herbicide.

[1] Subsequent to the decision of BLM under appeal and the Board's order putting the decision into effect, the Ninth Circuit Court of Appeals held that uncertainty about the safety of even low doses of the herbicide 2,4-D -- the possibility that the safe level of exposure to the herbicide is low or nonexistent -- creates a possibility of significant adverse effects on the human environment requiring preparation of a WCA under 40 CFR 1502.22. 2/ Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) v. Clark,

2/ The regulation at 40 CFR 1502.22 provides as follows:

"§ 1502.22 Incomplete or unavailable information.

"When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

"(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

"(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence."

720 F.2d 1475, 1479 (9th Cir. 1983). The fact that the worst case is unlikely to occur was held not to preclude the necessity of preparing a WCA: "The BLM's belief that its herbicides are safe does not relieve it from discussing the possibility that they are not, when its own experts admit that there is substantial uncertainty. When uncertainty exists, it must be exposed." 3/ Id. at 1479 (emphasis in original). Further, the fact that a herbicide has been registered with the EPA does not negate the requirement to prepare a WCA. Id. at 1480.

The WCA may be performed in the context of an EA prepared to supplement a programmatic EIS. Id. at 1480-81. However, where the WCA is included in the EA so that the EA becomes the functional equivalent of an EIS, the minimum 45-day comment period for a draft EIS is applicable. 40 CFR 1506.10(c); Save Our Ecosystems (SOS) v. Clark, No. 83-3908, slip op. at 9-10 (9th Cir. Jan. 27, 1984). 4/

Neither the draft EIS issued in 1979 nor the final EIS issued in 1980 for Shivwits Grazing Management analyzed the use of herbicides as a means to control sagebrush. 5/ Therefore, the EA was the first document in which BLM considered the environmental impact of herbicide spraying for the Pocum area. 6/ The failure of BLM to provide adequate advance notice and opportunity for response in connection with the EA regarding the proposal to spray

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3/ Regarding the uncertainty as to potential effects, we note that BLM includes the following excerpt from its draft EIS for the Western Oregon Program, June 1983, at 105:

"The allegation of carcinogenicity is based not on the existence of data but on the absence of data. The research on carcinogenicity of 2,4-D has been deficient in various ways, and, while the data is negative, it is not absolutely reliable for a scientific conclusion. However, neither is it a proper basis for concluding that 2,4-D is carcinogenic."

(BLM, U.S. Department of the Interior, Western Oregon Program -- Management of Competing Vegetation, Draft Environmental Impact Statement at 105 (1983)).

BLM acknowledges that, "The consensus among regulatory and other toxicologists is that the limited mutagenic activity does not represent a mutational hazard at amounts encountered either in the work place or the general environment." Id. at 106. Further, BLM concedes "the literature reports some nerve disorders allegedly caused by exposure to 2,4-D" (Brief at 9).

4/ The WCA regulation is contained in the section of the CEQ regulations (Part 1502) that discusses the format and content of an EIS. This placement supports a finding that the WCA, although actually placed in the EA, should be treated under the same procedures as an EIS. The CEQ regulations clearly contemplate that it will be treated as an EIS. See SOS v. Clark, supra at 25 n.11.

5/ See BLM's response to comment on the draft EIS reported in the final EIS at page 37, which reads: "The Shivwits grazing management program does not propose spraying as a means of land treatment."

6/ The copies of the AMP's appearing in the file do not analyze the environmental impacts of herbicide spraying. Rather, they reference the Shivwits EIS for analysis of impacts, despite the fact that it does not consider herbicide spraying.

2,4-D becomes a critical error in light of the prior lack of consideration of herbicide spraying in the EIS.

Accordingly, we conclude that a decision to make a spray application of the herbicide 2,4-D requires preparation of a WCA. Although this may be accomplished by means of an EA which supplements the EIS, provisions regarding notice and opportunity for comment applicable to preparation of an EIS must be observed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated.

C. Randall Grant, Jr.
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Bruce R. Harris
Administrative Judge